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No. 93-700

In the Supreme Court of the United States

OCTOBER TERM, 1993

BARBARA ANN CRANCER, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the government properly declined to create a document-by-document "*Vaughn* index" of law enforcement records withheld under Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(A).

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A33) is reported at 999 F.2d 1302. The panel opinion of the court of appeals (Pet. App. A34-A49) is reported at 950 F.2d 530. The opinions of the district court (Pet. App. A50-A60) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1993. The petition for a writ of certiorari was filed on November 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1975, James Riddle Hoffa, the former president of the International Brotherhood of Teamsters, disappeared in Michigan. The Federal Bureau of Investigation (FBI) immediately launched an intensive nationwide investigation into his disappearance. Pet. App. A35. Although no suspects have been charged, the investigation has never been closed, and the FBI continues to pursue the investigation actively. C.A. App. 69. Materials relating to the Hoffa investigation are contained in an open investigatory file in FBI headquarters (FBIHQ) in Washington, D.C. The 69 volumes of the FBIHQ file contain approximately 13,800 pages of records. *Id.* at 147.[1]

In 1987, the Department of Justice received a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, from petitioner, Hoffa's daughter, relating to the records at FBIHQ. C.A. App. 24-25. Although her request initially sought only information relating to a potential witness (*ibid.*), petitioner broadened the request to cover "any and all documents" in the FBIHQ Hoffa file. *Id.* at 77.

The FBI denied petitioner's requests, invoking Exemption 7(A) of the FOIA, 5 U.S.C. 553(b)(7)(A). C.A. App. 28, 78, 80. Exemption 7(A) exempts all "records or information compiled for law enforcement purposes * * * to the extent that the production * * * could reasonably be expected to interfere with enforcement proceedings."

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[1] Additional records relating to Hoffa's disappearance are maintained by the FBI's Detroit Field Office. Those records are not the subject of petitioner's request.

2. In February 1989, Crancer filed this action against respondent in the United States District Court for the Eastern District of Missouri under 5 U.S.C. 552(a)(4)(B). Petitioner's amended complaint alleged that the contents of the FBIHQ Hoffa file are not exempt from disclosure under Exemption 7(A). See C.A. App. 46-49.

In June 1990, respondent moved for summary judgment based on Exemption 7(A). In support of its motion, respondent submitted declarations by Special Agent Angus B. Llewellyn, a supervisor in the Freedom of Information-Privacy Acts Section at FBIHQ, and from Special Agent Jim E. Moody, the Chief of the Organized Crime Section of the Criminal Investigative Division at FBIHQ. C.A. App. 60-63, 64-76. The Moody declaration explained that the Hoffa investigation is ongoing and that

> [t]he files responsive to [petitioner's] FOIA request contain documents detailing the FBI's theories regarding the case, investigate leads [the FBI is] pursuing (and those [the FBI does not] consider worthy of pursuit), information furnished by confidential sources, information indicating who[] the prime suspects are considered to be, techniques being utilized by the FBI in this investigation, interviews of third parties and cooperating witnesses, results of laboratory and polygraph examinations, and suggestions as to how to proceed with this investigation. * * * In addition, the documents located in the voluminous file regarding this investigation contain information which may be utilized in a myriad of other possible criminal proceedings at the Federal, state and local levels.

Id. at 61. The Llewellyn declaration enumerated the categories of documents covered by the request,[2] and explained that the information contained in those records could enable the persons responsible for Hoffa's disappearance to "destroy or tamper with evidence, intimidate witnesses or construct a false alibi." *Id.* at 70-71.

The district court declined to rule on respondent's motion for summary judgment. Instead, the district court ordered respondent to serve upon petitioner within 30 days "an itemized, indexed inventory of every agency record or portion thereof responsive to [petitioner's] FOIA request which [respondent] asserts to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release said agency records or portions thereof in accordance with the indexing requirements outlined in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir.

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[2] Special Agent Llewellyn indicated that the files contain the following eight categories of records (C.A. App. 69-70):

[1] Documents setting forth leads to be conducted.

[2] Documents containing information received from confidential informants.

[3] Information and documents provided by local law enforcement.

[4] Interviews of third parties and cooperating witnesses.

[5] Public source information such as newspaper clippings and press releases.

[6] Public and sealed court documents.

[7] Laboratory reports setting forth the results of examination.

[8] Polygraph worksheets and reports.

1973), *cert. denied*, 415 U.S. 977 (1974)." Pet. App. A50.[3]

Respondent requested the district court to modify its order, and presented to the court a "categorical" index that broke down the contents of the FBIHQ Hoffa file into nine specific categories: (1) records of interviews of potential witnesses, suspects, associates of Hoffa, and others who may be of potential assistance to the investigation; (2) records containing the FBI's telephone toll records; (3) grand jury materials, including names of those who have given testimony, subpoenaed records, and transcripts of testimony; (4) records from FBI field divisions setting forth financial expenditures relating to the investigation; (5) records of high-level strategy conferences; (6) records describing the use of investigative techniques; (7) information furnished by local law enforcement agencies in connection with the investigation; (8) laboratory reports; and (9) memoranda to the Director of the FBI regarding the status of the investigation. Pet. App. A61-A64. With respect to each category of documents, the index described in

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[3] A so-called "*Vaughn* index" is an itemized inventory that "describe[s] each withheld document or deletion from a released document," "state[s] the exemption claimed for each deletion or withheld document," and "explain[s] why the exemption is relevant" to the document. *Founding Church of Scientology, Inc.* v. *Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979) (summarizing requirements). It is designed to assist the district court in reviewing the agency's withholding decisions on a document-by-document basis and to permit the requester to respond to the agency's claims of exemption. See *Keys* v. *United States Department of Justice*, 830 F.2d 337, 349 (D.C. Cir. 1987).

detail the potential harm to law enforcement efforts that would be caused by disclosure. *Ibid.*[4]

In January 1991, the district court denied the request to modify its order, and directed the government to submit a *Vaughn* index for in camera review. Pet. App. A36; see also *id.* at A52-A60.

3. Respondent then petitioned the court of appeals for a writ of mandamus. In December 1991, a divided panel of the court of appeals held that the district court had authority to order a document-by-document *Vaughn* index. Pet. App. A34-A49. The court acknowledged that in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Court held that the government may invoke Exemption 7(A) by establishing that generic categories of documents could reasonably be expected to interfere with law enforcement proceedings. Pet. App. A40; see *id.* at A41 (under *Robbins Tire*, "the district court cannot require the government to justify its decision to deny disclosure on a document-by-document basis"). The court, however, found that a document-by-document *Vaughn* index was nevertheless an appropriate way for the district court to "verify that the government has fulfilled its obligation to examine each document individually." *Id.* at A41-A42.[5]

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[4] For example, the index explained that disclosure of the strategy memoranda "would provide a blueprint of the FBI's investigation" and "would afford the perpetrator(s) the opportunity to obstruct the FBI's investigation by intimidating witnesses, tampering with evidence, constructing false alibis and/or otherwise misleading investigators." Pet. App. A63.

[5] Judge Wollman dissented, expressing the view that the majority's decision was inconsistent with the generic approach

4. The court of appeals granted rehearing en banc and reversed. Pet. App. A1-A33. The majority held that the district court's insistence on a document-by-document justification for withholding records under Exemption 7(A) "goes beyond the categorical explanations that * * * *Robbins Tire* held to be sufficient to justify nondisclosure under Exemption 7(A)." Pet. App. A13. The court explained that "[w]hen . . . a claimed FOIA exemption consists of a generic exclusion [such as Exemption 7(A)], dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Id.* at A13 (quoting *Church of Scientology* v. *IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986)). Under *Robbins Tire*, the court explained, "the government may meet its burden by showing how disclosure of each category of documents would likely interfere with the investigation." Pet. App. A12 n.3.

The en banc court made clear, however, that "[w]hile the district court may not order a *Vaughn* index * * *, it still must satisfy itself that the requested documents have been properly withheld." Pet. App. A15-A16. Relying on *Bevis* v. *Department of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986), the court held that "[1] the government must define functional categories of documents; [2] it must conduct a document-by-document review to assign documents to proper categories; and [3] it must explain to the court how the release of each category would interfere with enforcement proceedings." Pet. App. A14. If the categories offered by the government are not

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to Exemption 7(A) required by *Robbins Tire*. Pet. App. A45-A49.

sufficiently functional, the court of appeals explained, the district court may require "more specific, distinct categories" and may conduct in camera review of the disputed records. *Id.* at A14-A15.

The court of appeals "express[ed] no opinion" on the question whether the evidence submitted by respondent "satisfies the *Bevis* paradigm." Pet. App. A14 n.4. It remanded the case to the district court for resolution of that question and the ultimate issue of whether the FBIHQ Hoffa file is protected by Exemption 7(A). *Id.* at A16.[6]

ARGUMENT

The court of appeals correctly held that the district court could not properly require respondent to prepare a document-by-document *Vaughn* index for the nearly 14,000 pages of law enforcement records it withheld under Exemption 7(A) of the Freedom of Information Act. That ruling is consistent with this Court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*, and with the decisions of other courts of appeals. The court of appeals in this case, moreover, did not address whether the contents of the Hoffa file are exempt from disclosure under Exemption 7(A) or whether respondent's categorical showing in this case was sufficient under the FOIA. Those questions will be resolved in the ongoing district court proceed-

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[6] Judge McMillian, joined by Chief Judge Arnold, dissented, Pet. App. A16-A33, concluding that the district court had authority under the FOIA to order the production of a *Vaughn* index in an Exemption 7(A) case. *Id.* at A19-A33.

ings and may eliminate any need for this Court's review.[7]

1. Exemption 7(A) of the FOIA authorizes agencies to withhold "records or information compiled for law enforcement purposes * * * to the extent that the production of such law enforcement records or information * * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). This Court has recognized that unlike certain other FOIA exemptions, which "seem to require a showing that the factors made relevant by the statute are present in each distinct situation," the language of Exemption 7(A) "appears to contemplate that certain generic determinations might be made." *Robbins Tire*, 437 U.S. at 223-224. In light of the purposes underlying that exemption, moreover, this Court concluded that "Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally

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[7] The Sixth Circuit recently sustained the FBI's withholding of records from the Hoffa file under Exemption 7(A), holding that the categorical index the FBI submitted was adequate and that the district court had correctly found that the records sought could reasonably be expected to interfere with a future prosecution. *Dickerson* v. *United States Department of Justice*, 992 F.2d 1426 (1993), petition for cert. pending No. 93-678 (filed Oct. 29, 1993). The en banc court below noted that the Sixth Circuit's ruling in *Dickerson*, while not binding here, "does give credence to the Department's assertion of the 7(A) exemption in this case." Pet. App. A16. We have furnished counsel for petitioner with a copy of our brief in opposition in *Dickerson*.

'interfere with enforcement proceedings.'" *Id.* at 236.[8]

Accordingly, the courts of appeals have consistently applied a categorical approach in cases arising under Exemption 7(A). "It is well-established that 'the government need not justify its withholdings document-by-document; it may instead do so category-of-document by category-of-document.'" *North* v. *Walsh*, 881 F.2d 1088, 1097 n.13 (D.C. Cir. 1989). Under that approach, a document-by-document *Vaughn* index is not required. See, *e.g.*, *Lewis* v. *IRS*, 823 F.2d 375, 380 (9th Cir. 1987); *Wright* v. *OSHA*, 822 F.2d 642, 645-646 (7th Cir. 1987); *Spannaus* v. *United States Department of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987); *Curran* v. *Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987); *Moorefield* v. *United States Secret Service*, 611 F.2d 1021, 1023-1024 (5th Cir.), cert. denied, 449 U.S. 909 (1980); *Barney* v. *IRS*, 618 F.2d 1268, 1272-1274 (8th Cir. 1980). Indeed, as the D.C. Circuit (the court that devised the *Vaughn*

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[8] When this Court decided *Robbins Tire*, Exemption 7(A) shielded law enforcement records whose disclosure "*would* * * * interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1982) (emphasis added). In 1986, Congress amended Exemption 7(A) to require the government to show only that disclosure "*could reasonably be expected to* interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (1988) (emphasis added). That change "represents a considered congressional effort 'to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7].'" *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989). The withholding at issue in this case is therefore governed by a more generous standard than the one in place when the decision in *Robbins Tire* was issued.

index) has explained, "[w]hen * * * a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Church of Scientology* v. *IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986).

The decision of the court of appeals in this case is consistent with that uniform body of precedent. We are unaware of any post-*Robbins Tire* decision of a court of appeals holding that a district court may appropriately order a document-by-document *Vaughn* index when the government justifies withholding exclusively on the basis of Exemption 7(A).[9]

2. Petitioner concedes (Pet. 10) that "categorical showings under *Robbins Tire* are permissible to demonstrate the likelihood of harm" in Exemption 7(A) cases, but insists that a document-by-document *Vaughn* index is still needed to resolve other issues under Exemption 7(A). Specifically, she argues (Pet. 7-8) that a *Vaughn* index is needed to determine that the government has reviewed all of the documents, that they all fit within the categories identified, that they have not been publicly released, and that there are no reasonably segregable, nonexempt portions of the records.

As discussed above, since *Robbins Tire*, the courts of appeals have consistently declined to require

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[9] Petitioner quotes (Pet. 8-9) court of appeals decisions that discuss the usefulness of *Vaughn* indexes in adjudicating FOIA cases. Those cases, however, do not involve Exemption 7(A). See *King* v. *United States Department of Justice*, 830 F.2d 210 (D.C. Cir. 1987) (Exemption 1, 7(C), 7(D)); *Wiener* v. *FBI*, 943 F.2d 972, 977 n.2 (9th Cir. 1991) (Exemptions 1, 2, 3, 7(C), 7(D)), cert. denied, 112 S. Ct. 3013 (1992).

Vaughn indexes. Moreover, it is premature to consider what kind of showing is necessary to sustain a claim of exemption under Exemption 7(A) in this case. Neither the court of appeals nor the district court has decided whether respondent's categorical declarations are sufficient to resolve the outstanding factual and legal questions in this case. The court of appeals cited (Pet. App. A14) *Bevis* v. *United States Department of State*, *supra*—a case on which petitioner heavily relies (Pet. 10-11)—for the appropriate standard to apply to petitioner's challenge on remand. While not calling for a *Vaughn* index, *Bevis* establishes the following framework under Exemption 7(A):

> First, [the government] must define its categories functionally. Second, it must conduct a document-by-document review in order to assign documents to the proper category. Finally, it must explain to the court how the release of each category would interfere with enforcement proceedings.

801 F.2d at 1389-1390.

Because the "proceeding below * * * focused only on whether the district court could order a *Vaughn* index," the court of appeals in this case "express[ed] no opinion as to whether the categorical index submitted by [respondent] * * * satisfies the *Bevis* paradigm." Pet. App. A14 n.4. Accordingly, the sufficiency of the government's submissions will be reviewed in the proceedings now pending on remand, and further review of petitioner's claims is premature.[10]

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[10] Petitioner asserts (Pet. 10) that the decision of the court of appeals "guarantee[s] the withholding of any documents

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ments claimed to be exempt under Exemption 7(A)." That contention is baseless; the court of appeals did not hold that any of the withheld documents are protected by Exemption 7(A). Nothing in the court of appeals' decision forecloses the district court from engaging in careful review of the government's withholding claim under the standards set forth in *Robbins Tire* and *Bevis*.